

TANALIAN, INC., ET AL.

IBLA 83-171; 83-172; 83-173
ANCAB LS 77-2, NG 79-1, NG 79-2

Decided August 30, 1983

Consolidated appeals from determinations that established land boundaries of regional Alaska Native corporations, and held that Tanalian, Inc. is not a Native group eligible for land selection entitlement. AA 11157.

Hearing ordered.

1. Alaska Native Claims Settlement Act: Conveyances: Native Groups--Alaska Native Claims Settlement Act: Definitions: Generally

To establish its eligibility to select lands a Native group must constitute a majority of the residents in the locality. Where, on the critical date, all members of the Native group resided on a patented, surveyed, homestead in a community or neighborhood where there were other residents in relatively close proximity, the census or tally may not be limited to the 153 acres within the confines of the homestead boundaries, as the "locality" must include the neighboring area within which the other persons of the community resided.

APPEARANCES: Thomas S. Gingras, Esq., Anchorage, Alaska, for Tanalian, Inc.; Elizabeth B. Johnson, Esq., Anchorage, Alaska, for Bristol Bay Native Corp.; Robert C. Babson, Esq. Department Counsel, Anchorage, Alaska, for BLM and BIA; Barbara J. Miracle, Esq., Asst. Attorney General, for the State of Alaska; Joyce E. Bamberger, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On December 18, 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1627 (1976), to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a) (1976). As part of the claims settlement, 43 U.S.C. § 1613(h)(2) (1976) authorizes the Secretary of the Interior to "withdraw and convey to a Native group that does not qualify as a Native village, if it incorporates under the laws of Alaska, title to the surface estate in not more than 23,040 acres surrounding the Native group's

locality" from "2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title." "Native groups" are defined in 43 U.S.C. § 1602(d) (1976) as "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality," and is distinguished from a "Native village" on the basis that the group has insufficient numbers to qualify as a village. Cf. 43 U.S.C. § 1602(c), (d) (1976). The Secretary promulgated regulations regarding eligibility of Alaska Natives incorporated pursuant to ANCSA which give an eligible Native group the right to select up to 7,680 acres of land. 43 CFR 2653.6(b).

Tanalian, Inc. (Tanalian), is a Native corporation consisting of six members of the Alsworth family from two households who resided on a single private tract of 153 acres of surveyed land (U.S. Survey 3434), known as "the Alsworth homestead." Tanalian filed Native group application AA 11157, with the Alaska State Office, Bureau of Land Management (BLM), on December 15, 1975, pursuant to section 14(h)(2) of ANCSA, 43 U.S.C. § 1613(h)(2) (1976). See 42 FR 35228 (July 8, 1977).

The persons comprising Tanalian are enrolled at large to the Bristol Bay Native Corporation (BBNC), but reside at Port Alsworth on Lake Clark within the Cook Inlet Region. However, the lands selected by Tanalian in its application were withdrawn under sec. 11(a)(3), 43 U.S.C. § 1610(a)(3) (1976), of ANCSA as village deficiency lands through public land orders for several villages of Cook Inlet Regional, Inc. (CIRI). The respective regions were created by section 7(a) of ANCSA, 43 U.S.C. § 1606 (1976), and the boundaries were tentatively established by the Secretary of the Interior on December 11, 1972. The regional boundaries were set by decision AA 8104, dated February 2, 1977, of the Alaska State Office, BLM, after a period allowing for negotiations between the regional corporations.

Because 43 CFR 2653.6 requires Native group applications to be for land in the area surrounding the locality in which the Native members of a group reside and are enrolled, Tanalian appealed the boundary determination that designated their residential lands as CIRI lands to the Alaska Native Claims Appeals Board (ANCAB). Tanalian argues that Port Alsworth more properly belongs in the Bristol Bay Region by reasons of its geographical features and historical use. The appeal was designated ANCAB LS 77-2. Tanalian was informed by ANCAB that the appeal was possibly premature because it challenged a decision concerning regional land boundaries before certain issues, such as the eligibility or land selection entitlement of Tanalian as a Native group, had been determined. No further pleadings were received in the appeal at that time and ANCAB did not rule upon any of the issues involved, including standing.

Both prior and subsequent to Tanalian's appeal regarding regional boundaries, BBNC and CIRI discussed mutually adjusting their boundaries to allow the subject lands of Tanalian's application to be considered as BBNC lands. Potential boundary alterations were made dependent upon Tanalian's eligibility as a Native group entitled to the land, to be evidenced by a

certificate of eligibility issued by the Bureau of Indian Affairs (BIA) pursuant to 43 CFR 2653.6(a)(6).

BLM submitted the Native group application for Tanalian to BIA for an eligibility determination. See 42 FR 35288 (July 8, 1977). On June 19, 1978, BIA offered a report of investigation concluding that "Tanalian, Inc., satisfied the other requirements of the regulations pertaining to Native group applications," and recommended that Tanalian be approved as a Native group. However, ANCAB issued an "Order Setting Conference on Status Appeal," dated November 16, 1978, and proposed therein:

1. That the BIA file with the Board and all parties, its findings of fact as to whether Tanalian meets all criteria except land availability for certification of group status.
2. That the BIA file with the Board and all parties, a separate finding of fact as to whether Tanalian meets the criterion for land availability based on information from BLM.

As a result of its second examination, BIA concluded that Tanalian comprised only six members of a community of no less than 22 residents on April 1, 1970, of which at least 16 were non-Natives. One enrolled member was born after 1970 and therefore did not qualify for eligibility purposes. Furthermore, two of those enrolled did not verify that Port Alsworth was their continued place of residence since 1970. See 43 CFR 2653.6(a). Based upon those facts, BIA certified that Tanalian was ineligible as a Native group and recommended that their application for group eligibility be denied. BIA Report of Investigations dated March 14, 1979.

BIA also discussed the land eligibility qualifications of Tanalian and certified that Tanalian was ineligible because no land was available for selection within the prescribed area. See 43 CFR 2653.6(a)(6). BIA recommended the group be denied eligibility, but if, after negotiations between BBNC and CIRI, lands were made available, that it be entitled to select no more than 320 acres per member. See 43 CFR 2653.6(b)(1).

ANCAB adopted BIA's findings and recommendations in an order dated April 13, 1979. Therein, it accepted Tanalian's and BBNC's previously filed appeals of BIA's certificates of ineligibility. The ANCAB order designated the appeals regarding the eligibility of Tanalian for Native group status as ANCAB NG 79-1 and ANCAB NG 79-2, respectively. ANCAB and the parties involved were subsequently informed that the regulations pertaining to Native group applications were to be revised. Arguments were raised about the importance of certain issues unanswered by the then current regulations, i.e., the exact "locality" to be considered in 43 CFR 2653.6(a) determinations, and requests were received by ANCAB from the interested parties to postpone the appeals until the new regulations were promulgated. In an order dated May 14, 1979, ANCAB granted appellants an extension of 30 days after final publication of the subject regulations in which to file statements of reasons. ANCAB suspended the appeals in an Order dated October 5, 1979, pending publication in final form of regulations concerning Native groups under ANCSA.

ANCAB was abolished effective June 30, 1982, and all of its functions and responsibilities transferred to the Board of Land Appeals. 43 FR 26390 (June 18, 1982).

The Secretary of the Interior issued Order 3083, dated June 17, 1982, waiving certain non-statutory regulations and clarifying other regulations dealing with eligibility and land selections of Native groups under ANCSA in lieu of promulgating new or additional regulations.

Subsequent to issuance of Secretarial Order 3083 and service of it upon appellants by counsel for BLM, the Board reopened ANCAB LS 77-2, ANCAB NG 79-1, and ANCAB 79-2 in an order dated March 10, 1983, as IBLA 83-171, 83-172, and 83-173, respectively.

Appellants argue that BIA misapplied the regulations pertaining to "locality" in determining that Tanalian members did not comprise a majority of the residents of its locality. They also allege that BIA did not use all reasonable efforts to determine the residents of the locality as to the 1970 census enumeration date, and that part-time, temporary residents and nonresidents were improperly included. Appellants also question the objectivity of the second investigation. Appellants assert that the conclusion reached by BIA's first investigation, that Tanalian members did constitute a majority of the locality, is the proper determination.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act which provides in section 1416 that Tanalian is entitled to select from designated lands in the Port Alsworth area should it be certified as a Native group in accordance with ANCSA. P.L. 96-487, § 1416, 94 Stat. 2371, 2499 (1980). CIRI acknowledges that lands have been made available for selection by Tanalian which will not conflict with its selections or with selections of villages in the CIRI region. Furthermore, in Secretarial Order 3083, the eligibility requirement in 43 CFR 2653.6(a)(6) that land be available was waived. The order also waived the phrase "since that date" in 43 CFR 2653.6(a)(5), the basis for continued residence since the census date. Thus, those two reasons for denying certification have become moot, leaving two remaining issues on appeal.

The primary issue of the appeals is the definition applied in the investigation of Tanalian to "locality." While the term is used in both ANCSA and the pertinent regulation as a primary component in determining Native groups, a definition is not provided. However, the Department has defined locality in reference to Alaska geography as "a place or location with past or present cultural associations." Dictionary of Alaska Place Names, Geological Survey Professional Paper 567 (U.S. Dept. of the Interior, 1971 Reprint). Hence, 43 CFR 2653.6(a)(5) reads in part:

The Native group must have an identifiable physical location. The members of the group must use the group locality as a place where they actually live in permanent structures used as dwelling houses. The group must have the character of a separate community, distinguishable from nearby communities, and must be composed of more than a single family or household.

It was the duty of BIA to define the locality from which the determination of Tanalian's majority status was to be derived. See 43 CFR 2653.6(a)(4). Appellants assert that BIA established the locality of the group as Survey 3434, which is the Alsworth family homestead, and then incorrectly based its determination on a much broader area, and support their assertion through substantial reference to the record. Appellants' argument creates a situation which, if unexplained, suggests possible error in BIA's procedures.

However, the language of the first investigation made two statements concerning locality:

Port Alsworth is the locality of Tanalian Inc.

* * * * *

For this Report, the exterior boundaries of the Native group's locality is defined as the area enclosed by the improvements of the members of the Native Group, and surrounding area of land which has been selected and used by the Group in the Native manner and which may contain isolated improvements of the Group.

These statements did not confine the locality to just Survey 3434, but also included the surrounding area from which land was made available for Tanalian to select, e.g., Port Alsworth. While the second investigation mistakenly identified the locality as confined to Survey 3434, the census was based on a larger area, viz:

12. Field Investigation produces a definite identifiable physical location of the Tanalian Group in Section 4, T. 1 N., R. 29 W., Seward Meridian, State of Alaska (as required by 2653.6(a)(5)).

13. The Port Alsworth community comprised at least 22 residents in 1970, with the Tanalian Group concentrated within the larger community.

14. Extent of Boundaries are those contained in U.S. Survey 3434 * * *.

The delineation of "the locality" in which the Tanalian members reside is the first issue to be resolved upon hearing. This Board holds as a matter of law that the census of persons in the locality, for the purpose of determining Tanalian's eligibility, cannot be confined to the patented 153 acres of U.S. Survey 3434 known as "the Alsworth homestead" and occupied in 1970 exclusively by the Alsworth families. The "locality" must encompass the greater area in which other residents live in relative proximity, as compared with the population density of lands beyond the area so designated. Evidence of the extent to which residents of the area share common interests or concerns in the local amenities, facilities, and services may be received as indicative of the geographic area of the locality. "Locality" has been held

to be synonymous with "community." Conley v. Valley Motor Transport Co., 139 F.2d 692, 693 (6th Cir. 1943). It means the place, near the place, vicinity, or neighborhood. Connally v. General Construction Co., 269 U.S. 385 (1926). A considerable degree of discretion is vested in the Secretary to determine what shall constitute a locality for a particular purpose. Covington Mills v. Mitchell, 129 F. Supp. 740, 742 (D.D.C. 1955). The term must be construed so as to effectuate Congress' intention. Conley v. Valley Motor Transport Co., *supra*. The error of BIA in initially restricting its definition of "locality" to the boundaries of the patented Alsworth homestead is not binding on the Department.

The next issue must be whether the enrolled members of Tanalian comprise a majority of the Port Alsworth community. In 1978, BIA, pursuant to 43 CFR 2653.6(a)(4), conducted an investigation precedent to making that determination. An attempt to ascertain the local residents by reference to the official U.S. Census was made, but the information was unobtainable. BIA investigated by primarily interviewing and accepting affidavits from those associated with the Port Alsworth area. Based on their statements, BIA determined that 2 permanent and 12 part-time residents other than the Alsworths were in the area during 1970. However, that conclusion was based on a year-long analysis and was not reached by reference to a definite census date. *See* 43 CFR 2653.6(a)(5); Secretarial Order 3083 (June 17, 1982). The second investigation, ordered by ANCAB, projected the census as of April 1, 1970, the official U.S. Census enumeration date.

BIA concluded that at least 22 persons were residents of Port Alsworth as of that date, of which only six were Native members of Tanalian. Of the 16 nonmembers, three belonged to the Alsworth family. Appellants argue that the remaining persons were not residents. Nine of those 13 were in the Porter family. The Porters submitted to the investigators an affidavit stating that they all were residents of Port Alsworth in 1970. A specific date was not cited. Affidavits and testimonies of several others familiar with the area state that they cannot recall the Porters as residents as of the census date, but none of those statements affirmatively challenge the alleged fact. The Porters moved from Port Alsworth in 1971. Richard Rusk, who worked for and lived with the Porters, was also considered by BIA as a resident as of the census date.

Chester Whitehead, was another party considered as a resident in the BIA study. He did not maintain a place of his own, but lived at the request of others in their cabins during the winter. The records reflect that he was in the area during the 1970 census. Appellants argue that without a permanent place of residence he should not be considered a resident to be included in the determination.

The remaining two included in the BIA determination were Floyd and Freda Denison. Most of the information obtained by BIA tends to verify that they were residents as of the census date.

Based upon the evidence offered, we cannot reasonably determine whether the members of Tanalian constituted a majority of the residents in the locality on the 1970 census enumeration date. Appellant has not presented clear

and convincing evidence that BIA's investigation was improper or that its results were unfounded. However, appellants' presentation and references to the record produce facts and testimony which, if left unexplained, suggest possible error in the BIA investigation and conclusion. The statements found in the record of the investigation are insufficient to rebut appellants' assertions that several non-Natives were not residents of the Port Alsworth locality on the 1970 census enumeration date.

If the Administrative Law Judge determines that Tanalian did not constitute a majority as of the census enumeration date, then he shall affirm BIA's recommendation to deny Tanalian's Native group application. If he determines that Tanalian did, in fact, constitute the majority of the locality as determined, he shall proceed to determine the availability of lands for selection by Tanalian, considering and deciding the issues raised by the appeal docketed by ANCAB as LS 77-2.

By instrument filed with this Board on August 10, 1983, counsel for Tanalian described his recent and continuing negotiations to eliminate or minimize the issues and the participation of the parties, as well as similar negotiations between Bristol Bay Native Corporation and the State of Alaska to that end. This order should not be construed as inhibiting or postponing the conduct of such negotiations. However, any resulting agreements should be reported to the Administrative Law Judge who will preside at the hearing, rather than to this Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, these appeals are referred to the Hearings Division for assignment to an Administrative Law Judge, who will inform the parties regarding further procedures.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

